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Attorneys for Defendants  
OPERATION DIGNITY, INC., ALEX McELREE, WILLIAM KENNEDY,  
AND LINDA GRIFFIN

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MARK ANTOINE FOSTER,

Plaintiff,

v.

OPERATION DIGNITY, INC., a  
California Non-Profit corporation, ALEX  
McELREE, an individual, WILLIAM  
KENNEDY, an individual, LINDA  
GRIFFIN,

Defendants.

CASE NO.: C075030 MMC

**DEFENDANTS' NOTICE OF MOTION  
TO DISMISS, OR IN THE  
ALTERNATIVE, TO STAY;  
DECLARATION OF JAY W. BROWN  
AND EXHIBITS "A" - "D" ATTACHED  
THERE TO; [PROPOSED] ORDER IN  
SUPPORT THEREOF**

Date: January 11, 2008  
Time: 9:00 a.m.  
Courtroom 7, 19th Floor

TO PLAINTIFF MARK FOSTER IN PRO PER

PLEASE TAKE NOTICE that on January 11, 2008 at 9:00 a.m. or as soon thereafter as the matter may be heard in the above entitled court, located at 450 Golden Gate Avenue, San Francisco, California, defendants herein will move the court to dismiss, or in the alternative, to stay, the instant Federal Court action pursuant to Colorado River Water Conservation Dist. V. United States, 424 U.S. 800 (1976), on the grounds that plaintiff Foster has an identical case pending in the Superior Court of California, County of Alameda, entitled Foster v. Operation Dignity, Inc., a California Non-Profit corporation, ALEX McELREE, an individual, WILLIAM KENNEDY, an individual, LINDA

1 Alameda.

2 In plaintiff's State court action, Foster v. Operation Dignity, et al, Case No. RG06302322, filed  
3 February 26, 2007, he makes identical factual allegations, but limits the action to the first unlawful  
4 detainer action, Alameda County Superior Court Case No. AG06262593, which was filed on March  
5 30, 2006 . (State Court complaint, attached to declaration of Jay W. Brown at Exhibit "B".) In the  
6 opening paragraphs, numbers 1 through 10, Foster alleges that he was a resident of 2300 Moonlight  
7 Terrace, Apartment A in Alameda, taking possession on August 17, 2004, and that Operation Dignity  
8 was his landlord. In paragraphs 11 through 16, Foster addresses again the very same unlawful  
9 detainer actions addressed in his Federal complaint. Foster's State court action sets forth seven  
10 causes of action for retaliatory eviction, fraud, breach of covenant of good faith and fair dealing,  
11 breach of contract and infliction of emotional distress, all similar causes of action to those alleged in  
12 his Federal action. Foster's second complaint addresses the second unlawful detainer action, The  
13 second is Case No. AG06279183, which sought recovery of the premises for non-payment of rent,  
14 but essentially alleges the same facts and causes of action as the first state court action. Since both  
15 State court complaints arose out of the same tenancy, but two separate unlawful detainer actions, the  
16 two actions were consolidated, with the RG06302322 being the controlling case as it is the oldest  
17 action.

18 Foster's State court action remains pending in the Alameda County Superior Court, with the  
19 Honorable Stephen Dombrink assigned as the judge for all purposes. There is a case management  
20 conference set in the State action for March 7, 2008. The parties have been through one court ordered  
21 mediation. Discovery is progressing under Judge Dombrink's supervision. There are no dispositive  
22 motions pending, and Judge Dombrink will likely set a trial date in the 2008 timeframe. Given the  
23 fact that Foster has an identical State court action filed and active, it is clear that venue for the instant  
24 Federal matter is improper. Consequently, this matter should be dismissed.

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1 GRIFFITH, an individual (Alameda County Case No. RG06302322) based on the same facts and  
2 causes of action claimed in the instant matter against the same parties. Foster actually has two state  
3 court claims pending against defendants herein, the second being Foster v. Operation Dignity, et al.  
4 (Alameda County Case No. RG07318238). Pursuant to an Order of Consolidation, these two state  
5 actions were consolidated, with Case No. RG06302322 being the controlling matter. The consolidated  
6 cases are being handled by the Honorable Stephen Dombrink. (See Declaration of Jay W. Brown at  
7 Exhibits "A"- "D".)

8 This motion will be based upon this Notice of Motion and motion, the Memorandum of Points  
9 Authorities included herewith pursuant to Northern District of California Local Rule of Court 7.2, and  
10 the declaration of Jay W. Brown and Exhibit "A" - "D" attached thereto.

#### 11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 Operation Dignity is a non-profit corporation that provides subsidized transitional housing for  
13 veterans. Plaintiff Mark Foster has now filed a third lawsuit against the same defendant, all based  
14 upon the same allegations of discriminatory housing. He alleges in the instant matter that he was a  
15 resident of 2300 Moonlight Terrace in Alameda California, with a tenancy ranging from August 17,  
16 2004 through January 31, 2007. (Federal Complaint at para. 4, attached to declaration of Jay W.  
17 Brown at Exhibit "A".) He alleges that Operation Dignity was his landlord, and that the individually  
18 named defendants herein were employees of Operation Dignity. (Federal Complaint at paras. 5-13).  
19 In plaintiff's Federal Court complaint, he references two unlawful detainer actions filed by the  
20 defendants, which form the basis of the Federal Court action. The first is Alameda County Superior  
21 Court Case No. AG06262593, which was filed on March 30, 2006 which sought recovery of the  
22 premises from Mr. Foster based on his non-participation in case management services. The second  
23 is Case No. AG06279183, which sought recovery of the premises for non-payment of rent. Based  
24 upon a negotiated stipulation between the parties, Foster vacated the premises on January 31, 2007.  
25 (Federal Complaint at para. 17.) The Federal Court complaint sets forth Nine Counts, including  
26 retaliatory eviction, breach of the covenant of good faith and fair dealing, breach of contract, fraud and  
27 infliction of emotional distress, all allegedly arising out of plaintiff's tenancy at Moonlight Terrace in  
28

## II. LEGAL ARGUMENT

### **This Matter Should Be Dismissed, or Stayed, Pursuant to the Colorado River Doctrine**

The doctrine set forth in Colorado River v. United States, 424 U.S. 800, “Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in Federal Court having jurisdiction.” (Colorado River, 424 U.S. at 817.) However, in exceptional circumstances, it is appropriate for a federal court to either dismiss or stay a case that is concurrent with a state court action. (Colorado River 424 U.S. at 818.)

In Colorado River, the Supreme Court articulated four factors for determine whether sufficiently exceptional circumstances exist to warrant abstention: (1) whether either the state or federal court has exercised jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the forums obtained jurisdiction. In Moses Cone Memorial Hosp. V. Mercury Construction Corporation, the court added two more considerations: (5) whether federal or state law controls and (6) whether the state court is adequate to protect the parties’ rights. (Nakash v. Marciano, 882 F.2d 1411, 1415 (9<sup>th</sup> Cir. 1989). In the Ninth Circuit also the court should consider whether the state and federal actions are “substantially similar.” (*Id.* at p. 1417.) Courts must not apply the checklist mechanically, but rather, carefully balance the important factors as they apply in a given case. (Moses Cone., 460 U.S. at 16.)

This doctrine rests on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation. (Nakash, 882 F.2d at 1415.). As for similarity of actions, the Ninth Circuit has explained, “exact parallelism” between the two actions is not required. Rather, it is adequate if the state and federal actions are “substantially similar.” (*Id.* At p. 1416.)

In Nakash, the federal action involved slightly different parties and similar, but not identical causes of action. The court found that the two actions were substantially similar. The court reasoned that the disputes in both actions arose out of the same conduct. (*Id.* at p. 1416.) Similarly, in Silvaco Date Systems, Inc. v. Technology Modeling Associates, Inc., 896 F.Supp. 973, 976 (N.D. Cal. 1995), although the federal and state claims were not identical, they both arose

1 out of the same dispute between the two same parties. Moreover, the crux of the allegations were  
2 the same in both forums. Thus, the court concluded that although the two matters did not raise  
3 identical factual or legal issues, the two actions were substantially similar to justify applying the  
4 Colorado River doctrine.

5 The application of the Colorado River doctrine, to either dismiss or stay this matter is  
6 warranted under these circumstances. The State and Federal actions are identical, and arise out of  
7 Foster's tenancy at Moonlight Terrace. The State matters address the two unlawful detainer matters  
8 and the grounds for each. The Federal action also addresses the two unlawful detainer matters. Both  
9 actions alleged the same or identical causes of action, i.e., retaliatory eviction, breach of contract,  
10 breach of covenant of good faith and fair dealing, infliction of emotional distress. The State court  
11 actions were filed first, and the first in fact is approaching its one year anniversary of December 14,  
12 2006. Moreover, since plaintiff is alleging the same set of facts, and maintaining the same causes of  
13 action, it is clear that the State court action is more than adequate to address his grievances against  
14 defendants herein. Defendants are contesting liability in the State court matter. Plaintiff has a judge  
15 assigned to his consolidated matter, and the judge in fact is monitoring the progress of this case. All  
16 parties underwent a full day mediation session. The court will set this matter for trial in the 2008 time  
17 frame and Foster will have his day in court so to speak with a jury of his peers to decide this dispute.  
18 Consequently, this matter should be dismissed in its entirety based upon the factors set forth in  
19 Colorado River, or, at the very least, stayed pending the outcome of the State court action.

20 As for priority of proceedings, this factor is measured in terms of how much progress has been  
21 made in the two actions. (Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., supra, 460 U.S. at  
22 21; see also Stewart v. Western Heritage Ins. Co. (5<sup>th</sup> Cir. 2006) 438 F.3d 488, 492-493-abstention  
23 favored when federal case has not proceeded past filing of complaint.) Depending on the relevant  
24 factors, a stay may be proper in ordinary tort and contract cases. (Nakash v. Marciano, supra 882 F.2d  
25 1411-1415-state case had progressed far beyond federal case so that it would be highly inefficient to  
26 allow federal case to proceed.)

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III. CONCLUSION

Based upon the foregoing, defendants herein respectfully request that this court dismiss plaintiff's complaint with prejudice, or stay the matter pending the outcome of the State court action, pursuant to the Colorado River doctrine.

DATED: November 30, 2007

CLAPP, MORONEY, BELLAGAMBA  
and VUCINICH

By: 

CHRISTOPHER J. BEEMAN, ESQ.  
Attorneys for Defendants OPERATION DIGNITY,  
INC., ALEX McELREE, WILLIAM KENNEDY, AND  
LINDA GRIFFIN

**Foster v. Operation Dignity, Inc., a California Non-Profit Corp et al.**  
**U.S.D.C., Northern Dist. OF California, C075030 MMC**

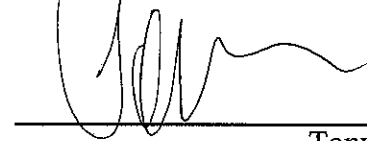
**PROOF OF SERVICE**

I hereby certify that I sent by regular U.S. Mail, the following:

DEFENDANTS' NOTICE OF MOTION TO DISMISS, OR IN THE  
ALTERNATIVE, TO STAY; DECLARATION OF JAY W. BROWN AND  
EXHIBITS "A" - "D" ATTACHED THERETO; [PROPOSED] ORDER IN  
SUPPORT THEREOF

Mark Antoine Foster In Pro Per  
725 Ellis Street, #408  
San Francisco, CA 94109

Executed on December 3, 2007 at Pleasanton, California. I declare under penalty of perjury  
under the laws of the State of California that the foregoing is true and correct.



Tonyia Neves